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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 461

WILLIAM GREENOUGH AND GEORGE HENRY WARREN, JR., TRUSTEES,

Appellants,

vs.

TAX ASSESSORS OF THE CITY OF NEWPORT; AND EDWARD L. LEAHY, TAX ADMINISTRATOR OF THE STATE OF RHODE ISLAND

APPEAL FROM THE SUPERIOR COURT OF THE COUNTY OF NEWPORT, STATE OF RHODE ISLAND

STATEMENT AS TO JURISDICTION

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STATEMENT AS TO JURISDICTION PURSUANT TO RULE 12 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES.

This is an appeal from the final judgment of the Superior Court of the County of Newport in the State of Rhode Island, which is the highest court of the State of Rhode Island in which the decision could be had in a cause wherein there is drawn in question the validity of a statute of the State of Rhode Island, on the ground of its being repugnant

to Section 1 of the Fourteenth Amendment to the Constitution of the United States and in contravention thereof.

This action was commenced in the Superior Court for the County of Newport, which in Rhode Island, is the Court of first instance. The case was taken from that Court to the Supreme Court of the State of Rhode Isalnd by a bill of exceptions after decision for the defendants and there the rulings and decision of the trial court were reviewed and the exception of the petitioner overruled and the case remitted to the Superior Court for Newport where judgment was entered for the defendants.

The action was a petition for relief from a tax assessment brought by the petitioners as trustees under the will of George Henry Warren, late of New York, deceased, against the Tax Assessors of the City of Newport under the provisions of the General Laws of Rhode Island 1938, Chapter 31, Section 14, page 111. The petitioners are seeking to recover back a tax paid by them under protest. The basis of the petition filed was that the tax in question was illegally and unconstitutionally assessed in violation of the Constitution of the United States. The evidence showed that the petitioners, William Greenough and George Henry Warren, Jr., are duly qualified co-trustees under the will of George Henry Warren, who died June 3, 1943 a resident of the City of New York, County of New York and State of New York, where the will was duly admitted to probate by a decree of the Surrogate's Court of the County of New York entered June 30, 1943 and letters testamentary issued to the petitioners, and a copy of the will authenticated under the Act of Congress was also ordered filed and recorded and letters testamentary in Rhode Island were issued to the petitioners by a decree of the Probate Court of the City of Newport, County of Newport and State of Rhode Island entered on November 15, 1943.

Under the fifth clause of the will, the petitioners were bequeathed the sum of $400,000 to be held by them in trust to pay the income to the testator's daughter Constance Whitney Warren for and during her natural life. By the Sixth clause of the will, the further sum of $200,000 was bequeathed to the petitioners to be held in the same manner as the $400,000 bequeathed under the Fifth clause.

The Testator's daughter Constance Whitney Warren, beneficiary for life was and is a resident of the State of New York and the petitioner and trustee, William Greenough, a resident of that state; that the petitioner and trustee, George Henry Warren, Jr., is a domiciled resident of the City of Newport in the State of Rhode Island. That at the time of the death of the testator and on June 15, 1944 at 12 o'clock noon, which was the time for the assessment of the tax involved in this proceeding and at all times up to the hearing in the Superior Court, all of the intangible personal property constituting the principal of the above mentioned trust fund was located in the City of New York and never had been located in Rhode Island.

The assessment was assessed by the respondent Tax Assessors under the provisions of General Laws of Rhode Island 1938, Chapter 30, Section 9, Subsection fifth, page 106 as follows:

> "Fifth. Intangible personal property held in trust by any executor, administrator, or trustee, whether under an express or implied trust, the income of which is to be paid to any other person, shall be taxed to such executor, administrator or trustee in the town where such other person resides; but if such other person resides out of the state, then in the town where the executor, administrator, or trustee resides; and if there be more than one such executor, administrator or trustee, then in equal proportions to each of such executors, administrators, and trustees in the towns where they respectively reside."

The evidence showed that a tax of $50 for the fiscal year 1944 to 1945 appears on the assessment roll of the City of Newport as follows:

> "Warren George H Jr Trustee UW of George H Warren for Constance Whitney Warren, Intangible Personal Property $12,500. Tax $50."

And that according to information given to the Tax Assessors of Newport prior to the above assessment by an attorney at law representing the trustee George Henry Warren, Jr., $12,50 was based on one-half of the sum held by the trustees on the date of the assessment as the then corpus of the trust.

Statutory Provisions as to Jurisdiction

This appeal is taken under Section 344 of Title 28 of the United States Code which is likewise Section 237 of the Judicial Code. This section provides that a final judgment or decree in any cause in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution of the United States and the decision is in favor of its validity may be reviewed by the Supreme Court of the United States upon appeal.

Statute of the State Involved

The statute of the State of Rhode Island involved is General Laws of Rhode Island, 1938, Chapter 30, Sec. 9, Subsection fifth, page 106, as follows:

> "Fifth. Intangible personal property held in trust by any executor, administrator, or trustee, whether under an express or implied trust, the income of which is to be paid to any other person, shall be taxed to such executor, administrator or trustee in the town

where such other person resides; but if such other person resides out of the state, then in the town where the executor, administrator, or trustee resides; and if there be more than one such executor, administrator or trustee, then in equal proportions to each of such executors, administrators, and trustees in the towns where they respectively reside."

Date of Judgment or Decree Sought to Be Reviewed

The date of the final judgment of the Superior Court for the County of Newport in the State of Rhode Island, sought to be reviewed is July 2, 1946. The date upon which the application for appeal is presented to the Presiding Justice of the Superior Court of the State of Rhode Island is August 7th 1946.

Opinions Delivered in the Courts Below

A copy of the opinion of the Supreme Court of the State of Rhode Island and the opinions of the Superior Court are hereto appended and marked Exhibits A, B and C respectively.

Substantiality of Questions Involved

This is a petition for relief from the assessment of a tax and is brought under General Laws of Rhode Island 1938, Chapter 31, Section 14. The question involved is whether under the provisions of Subsection Fifth of Section 9 of Chapter 30, page 106, of the General Laws of Rhode Island as follows:

"Fifth. Intangible personal property held in trust by any executor, administrator, or trustee, whether under an express or implied trust, the income of which is to be paid to any other person, shall be taxed to such executor, administrator or trustee in the town where such other person resides; but if such other person resides out of the state, then in the town where the

executor, administrator, or trustee resides; and if there be more than one such executor, administrator or trustee, then in equal proportions to each of such executors, administrators, and trustees in the towns where they respectively reside."

a tax can constitutionally be assessed by the City of Newport on George Henry Warren, Jr., Trustee, one of two trustees under the will of George Henry Warren, a resident of New York. The sole basis for the tax is that George Henry Warren, Jr., as an individual resides in the City of Newport, County of Newport, State of Rhode Island. The tax was assessed as follows:

"Warren George H Jr Trustee UW of George H Warren for Constance Whitney Warren, Intangible Personal Prop[illegible] $12,500. Tax $50."

It appears from the evidence that the testator was a resident of the State of New York; that the beneficiary of the trust, the testator's daughter, is a resident of the State of New York; that the petitioner and trustee, William Greenough, is likewise a resident of that state and that the intangible property forming the trust estate is located there and the trust established and admistered under the laws of the State of New York by the co-trustees as joint tenants, and that the trust estate has never been in the State of Rhode Island.

The petition alleges that George Henry Warren, late a resident of the City, County and State of New York died on the 3rd day of June, A. D. 1943, leaving a last will and testament dated April 19, 1943, which by a decree of the Surrogate's Court of the County of New York entered on the 30th day of June, 1943, was duly admitted to probate and letters testamentary issued to the petitioners, the executors named therein; that by a decree of the Probate Court of the City of Newport in the County of Newport

and State of Rhode Island, entered on the 15th. day of November, A. D. 1943, a copy of said will authenticated under the Act of Congress, was ordered filed and recorded and letters testamentary in Rhode Island issued to the petitioners. That said will provided in Clauses Fifth and Sixth as follows:

"I give and bequeath unto my executors and trustees hereinafter named or unto such of them as shall qualify and undertake the execution of this my will and unto the survivor of them and their successors the sum of Four hundred thousand dollars in trust nevertheless to invest and keep the same invested and receive and collect the interest and income derived therefrom and to pay and apply the net interest and income arising therefrom to the use of my daughter Constance Whitney Warren for and during her natural life and upon and after her decease or in the event my said daughter shall die before me then to assign transfer and pay over the said principal sum of Four hundred thousand dollars so held in trust for her as aforesaid or the securities in which the same may then be invested and I give and bequeath the same unto her then living children in equal shares and unto the issue of any child of hers who may have previously died leaving issue then surviving such issue however to take the part or share which his her or their parent would have taken if living per stirpes and not per capita.

"In the event however there shall be no child or children or issue of a deceased child or children of my said daughter then surviving then to hold and continue to hold the said sum of Four hundred thousand dollars upon the further trust to invest and keep the same invested and receive and collect the interest and income derived therefrom and to pay and apply the net interest and income arising therefrom to the use of my son George Henry Warren junior during his natural life and upon and after his decease then to assign

transfer and pay over the said principal sum of Four hundred thousand dollars or the securities in which the same may then be invested and I give and bequeath the same unto his issue per stirpes and not per capita."

"Sixth: * * * I do likewise give and bequeath to my executors and trustees hereinafter named or unto such of them as shall qualify and undertake the execution of this my will and unto the survivor of them and their successors the further sum of Two hundred thousand dollars in augmentation of and to be added to the principal of the trust created by the fifth clause of this my will for the benefit of my daughter Constance Whitney Warren to be held and disposed of by them upon the same terms and conditions as set forth in said fifth clause."

The petition then alleges that William Greenough, one of the trustees appointed under Clauses Fifth and Sixth respectively, is a resident of the State of New York, George Henry Warren, Jr., the other trustee is a resident of the City of Newport, and that Constance Whitney Warren, the beneficiary for life under said trust is a resident of the State of New York; that all of the intangible personal property constituting the principal of said trust was, at the time of the death of said George Henry Warren and on the 15th day of June, 1944, at 12 o'clock noon, the time fixed for the assessment of the tax, and at all times since the death of said George Henry Warren was and is now located in the City, County and State of New York and never has been located in the State of Rhode Island and has not received or enjoyed any benefit or protection from the laws of the State of Rhode Island. The petition then alleges the assessment of the tax; that on the 30th day of September, A. D. 1944, your Petitioners paid said tax under protest.

The petition then alleges:

"6. That the assessment of said tax against said George Henry Warren, Jr. Trustee under the will of George Henry Warren is illegal, unconstitutional and void:

(1) Because the fund constituting the intangible personal property upon which said tax was assessed was owned by a non-resident testator and was, on the 15th day of June, 1944, located in the State of New York and was never in the State of Rhode Island.

(2) Because, in addition thereto, the beneficiary for life of the aforesaid trust fund and one of the trustees are residents of the City of New York.

(3) Because the trustees of said trust fund hold said trust fund, so located in the State of New York, as joint tenants, and their title and interest in said fund as such joint tenants are not severable or divisible for the purposes of taxation or otherwise, and their powers must be exercised as a unit.

(4) Because George Henry Warren, Jr., as an individual resident of Rhode Island, does not, as trustee, exercise his powers as trustee in Rhode Island, nor does he, as trustee, enjoy any profits or protection from the laws of Rhode Island.

(5) Because said trust fund upon which said tax was assessed is, under the laws of the State of New York, subject to the payment of the New York income tax, and the taxation of said fund as intangible personal property in the State of Rhode Island subjects said fund to double taxation.

(6) Because the provisions of subsection Fifth of Section 9 of Chapter 30 of the General Laws of 1938, and any tax levied against the petitioners as aforesaid thereunder, or under any other provisions of law in the circumstances and under the conditions aforesaid is unconstitutional and in violation of Article XIV

of the Amendments of the Constitution of the United States providing that no state 'shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction equal protection of the law.'

(7) Because the provisions of Subsection Fifth of Section 9 of Chapter 30 of the General Laws of 1938, and any tax levied against the petitioners as aforesaid thereunder or under any provisions of law in the circumstances and under the conditions aforesaid, is unconstitutional and in violation of the provisions of Section 16 of Article I of the Constitution of the State of Rhode Island, providing that private property shall not be taken for public uses without just compensation.

7. That by reason of the above, your petitioners are entitled to recover from the City of Newport the said tax paid by them as aforesaid:"

(The original petition erroneously referred to Article V. This was later amended by order of the Supreme Court entered November 30, 1945 to read Article XIV.)

The respondents filed a demurrer to the petition and a motion to strike out William Greenough as one of the petitioners. The motion to strike out was denied. The demurrer was overruled. See rescript of Sullivan J., Exhibit B, hereto attached.

The respondents filed an answer as follows:

"And for a further plea in this behalf, the defendants say that the Petitioners ought not to have or maintain their action against them, because, they say, that the assessment of said tax against said George H. Warren, Jr., Trustee under the will of George Henry Warren, is not illegal, unconstitutional and/or void. And this the defendants are ready to verify. Wherefore, they pray judgment if the Petitioners ought to have or maintain their action against them, etc."

"And for a further plea in this behalf, the defendants say that the petitioner and/or petitioners ought not to

have or maintain their action against them because, they say, that the assessment on the intangible personal estate of the petitioner, George H. Warren, Jr., Trustee, was not illegal, unconstitutional and/or in violation of the provisions of Article XIV of the Amendments of the Constitution of the United States as complained of by the petitioner. And this the defendants are ready to verify. Wherefore, they pray judgment if the petitioners ought to have or maintain their action against them, etc."

On December 14th, 1944, the petitioners filed a motion as follows:

"Suggestion of Constitutionality of an Act of the General Assembly.

"The petitioners in the above entitled cause hereby represent that the constitutionality of an act of the General Assembly is brought in question upon the record of said cause and so far affects the merits of the controversy that it ought to be determined by the Supreme Court before further proceedings; Wherefore they move that said cause be certified to the Supreme Court for its determination thereof."

This was filed in accordance with the provisions of General Laws, Rhode Island, 1938, Chapter 545, page 1028 as amended by the Public Laws of Rhode Island, 1940, Chapter 941, Sec. 1, page 620 and sec. 6 of Chapter 545 as amended by Sec. 2 of Chapter 941 of the Public Laws of Rhode Island, 1940, page 620, as follows:

"Whenever in any proceedings, civil or criminal, in the superior court or in any district court, prior to the trial thereof on its merits, or upon a motion in arrest of judgment, any question of law shall arise, or the constitutionality of an act of the general assembly shall be brought in question upon the record, which in the opinion of the court, or in the opinion of the attorney-general, if the state be a party to such proceeding, is

of such doubt and importance, and so affects the merits of the controversy that it ought to be determined by the supreme court before further proceedings, the court in which the cause is pending shall certify such question or motions to the supreme court for that purpose and stay all further proceedings until the question is heard and determined . . . ."

The Court in the exercise of its discretion declined to certify the case at that time.

From all of the above it is clear that the question of the constitutionality of the statute was raised directly in the pleadings, in the petition, in the answer and by a motion filed and at the hearing on the merits as shown by a copy of the transcript of testimony filed herewith.

Transcript page 2: (See P. 20 of this Transcript)

"Mr. Harvey: . . . The petition recites that George H. Warren senior at the time of his death was a legal resident of the State of New York; that he died and his will was probated before the Surrogate's Court of the County of New York, and that letters testamentary were issued to George H. Warren junior and William Greenough, the executors, and that those two were appointed trustees under Sections 5 and 6 of his will; that William Greenough, one of the trustees, is a resident of New York; that Constance Whitney Warren, a beneficiary for life, is a resident of New York; that a fund constituting $12,500 was on the 15th of June, 1944 and at all times for that matter, in the State of New York and was never in the State of Rhode Island; that under these conditions and from these facts that taxation of George H. Warren junior against George H. Warren junior as trustee on $12,500 worth of intangible personal property, which constituted on the 15th of June one-half of the intangible property then held by these trustees in the State of New York is unconstitutional and void and illegal, both under the Constitution of the United States, citing Article 5 of the

amendments to the Constitution of the United States, and is also in violation of the Constitution of the State of Rhode Island."

Transcript, pages 16, 17, 18, 19, 20, 21, 22, 23 and 24: (See Ps. 34, 35, 36, 37, 38, 39, 40, 41, 42 of this Transcript)

"The Court: Is there any allegation they are being taxed on this property for which—the City of Newport has made an assessment which is unconstitutional?

"Mr. Burke: That would come up under a constitutional question.

"The Court: It seems to me you have a constitutional question raised here. I think this case should go to the Supreme Court. The court does not desire to shut you off, but the statute as I read it, and the allegation of unconstitutionality in the assessment, the court feels it is of such vital importance to the city of Newport, the financial department of the city of Newport, that this matter should be certified to the Supreme Court for an opinion. There is no use sending it up piecemeal, and neither is there any use in setting it out piecemeal now and asking me to decide the question, when it is alleged in the bill that this assessment is in violation of the State and Federal Constitution and it is double taxation. It seems to the court it will not do any harm to the Supreme Court to have Mr. Greenough express an opinion as an expert as to the allegation set out in the bill.

"Mr. Burke: On the question of constitutionality that was brought up here some time ago and the motion was denied to have the case certified. I think as far as this court is concerned, the question of constitutionality cannot be interposed. You will find that Mr. Justice Joslin passed on the question and denied the motion to certify this case to the Supreme Court. I think that is the law in this case.

"Mr. Harvey: There are three cases which I would like to call to the court's attention, leaving out for the moment the question of the constitutionality, which I

say is the controlling factor, and those cases hold, and one is a Massachusetts case, 224 Mass. Newcomb *v.* Page, that the question of whether or not New York taxes this same property is a material question. Also in a Pennsylvania case the court observed the same thing. Those cases will have to be cited to any court which hears this case, and when the court reads it, it will see the very question, in the Massachusetts case right in there as part of the opinion, the law of New York, as to whether or not this property is taxable in New York. As to the constitutionality, Judge Joslin had passed on this but he had not heard any testimony at that time.

"The Court: Doesn't that make a difference? The Court feels still quite strongly without attempting to overrule Judge Joslin or go contrary to his opinion, for whom I have the greatest respect, but here is Chapter 941 of the Public Laws:

"'Whenever in any proceeding, civil or criminal, in the superior court or in any district court, prior to the trial thereof on its merits, or upon a motion in arrest of judgment, any question of law shall arise, or the constitutionality of an act of the general assembly shall be brought in question upon the record, which in the opinion of the court, or in the opinion of the attorney-general, if the state be a party to such proceeding, is of such doubt and importance, and so affects the merits of the controversy that it ought to be determined by the Supreme Court before further proceedings, the court in which the cause is pending shall certify such question or motion to the supreme court for that purpose and stay all further proceedings until the question is heard and determined: Provided, that no question shall be so certified in any criminal case where the defendant has not been released on bail.'"

"Now, how am I bound in any way? Don't you think there is a question of importance raised on the question of constitutionality?

"Mr. Burke: I don't think there is any question of importance raised here, Your Honor, that justified

your Honor in finding for the plaintiff except a question of a constitutional question. Mr. Harvey will present two questions, whether this tax is valid, whether there is any valid tax, and secondly, if it is valid is it constitutional. It seems to me this case may be certified and the Supreme Court may send it back.

"The Court: There won't be any great harm in that.

"Mr. Burke: I think the city is entitled to have this matter determined upon its merits here today. If there is a constitutional question involved, it will go in the usual course to the Supreme Court. If there is any question of the validity of the tax, outside of its constitutionality, that has to be determined in this court in the first place. If it isn't determined in the first place and if the court decides this statute is constitutional, then it may go to the Supreme Court of the United States, and they may decide it is constitutional and then it comes back here again on the validity of this assessment. I think the proper procedure in this case is to let this case be decided here today on all the questions. If the plaintiff has made out a case, he is entitled to a decision. If he has not made out a case, the city is entitled to make this assessment.

"The Court: The only thing is this statute leaves the matter in the opinion of the court. You substitute yourself for the court. 'In the opinion of the court.' It is my opinion it is of a constitutional nature and of such doubt and importance.

"Mr. Burke: If that is your opinion, that is your opinion. You have the right.

"The Court: You have a statute upon which taxes have been assessed which is presumed to be constitutional. Mr. Harvey raised the constitutional question. He says it is unconstitutional and illegal, and there should not be any assessment made.

"Mr. Burke: I argued this matter at great length before Mr. Justice Joslin on the question of whether or not this statute was unconstitutional. We went into the question. I showed to Judge Joslin and I

can show to Your Honor that this statute has been in effect almost a hundred years in Rhode Island, and the constitutionality of it has never been questioned.

"The Court: Until today.

"Mr. Burke: On the line of decisions on the subject I say there is not sufficient serious doubt presented here today to justify Your Honor in saying that this case does involve such doubt and importance that it should be certified to the Supreme Court, in view of the statute for over a hundred years and the number of cases that have been brought under this statute testing its validity. The question of its constitutionality was never raised until this case, as far as I know.

"The Court: If you make that argument before the Supreme Court perhaps they won't take much time in deciding it should be brought back here.

"Mr. Harvey: There has never been any litigation in the Supreme Court under this statute on the facts such as these. Here is a deceased person who dies a resident of New York. All his property at the time of taxation, all the property held by the trustees, was in New York. The beneficiary is a resident of New York. New York State assesses a tax on this property.

"Mr. Burke: I say the statute is plain in this case. It gives the power to the tax assessors. No question about their authority. The assessors know Mr. Greenough is a resident of New York. They know this property is in New York. They know George Henry Warren is a resident of the City of Newport, and under that Statute they made this assessment, and they are justified in doing so.

"Mr. Harvey: That is non sequitur.

"Mr. Burke: The statute is plain in this case Your Honor realizes that this matter, this case involves a very serious matter and is a very important matter in this state.

"The Court: The court has that in mind. That is why the court is taking this slant on it. It is very important. It is a matter which should be straight-

ened out once and for all if it has been attacked on its constitutionality.

"Mr. Burke: That will have to be decided by the Supreme Court. It is Your Honor's duty——

"The Court: The only difference between the court and counsel is that counsel says I must decide the case and then have either side take it up to the Supreme Court. The court feels that it should go up there immediately upon the question, and let them decide it once and for all.

"Mr. Burke: They won't decide it once and for all.

"The Court: Then they will send it back, and nobody will be too seriously harmed. It is barely started, and it is not an extensive trial up to date.

"Question read by stenographer as follows:

"'Q. Will you state whether or not under the laws of the State of New York you and Mr. George H. Warren junior as trustees are in any way taxable on the property held by you under the fifth and sixth clauses of the will of George H. Warren senior for the benefit of Constance Whitney Warren?'"

Page 32 of Transcript: (See P. 50 of this Transcript).

"The Court: After hearing the testimony in the case, as the court has already said, the question of the constitutionality of the assessment and of the statute under which it has been made having been raised in the bill and in the case, the court feels that a question of such doubt and importance has been raised that this case should be certified to the Supreme Court. Counsel, the City Solicitor agrees that the matter should be passed upon by the Supreme Court. The question now is the way to get it there. It seems to me the court can pass upon it and then either side can go up on a bill of exceptions . . ."

The case, however, was not at that time certified, but was heard and decided.

The trial judge in his rescript stated on pages 29-30 of Exhibit B: (See P's 78, 79 of this transcript)

"This tax was paid under protest and the Petitioners contend that said assessment is illegal, unconstitutional and void: (1) Because the property assessed was owned by a non-resident testator and was located in the State of New York and never located in Rhode Island; (2) Because the beneficiary for life and one of the trustees are residents of New York; (3) Because said trust fund is held by said trustees as joint tenants, their interest in said fund being not severable or divisible and their powers must be exercised as a suit; (4) Because Petitioner Warren as a resident of Rhode Island, does not as trustee exercise his powers as trustee in Rhode Island and enjoys no protection or profit from this State; (5) Because said trust fund, on which said tax was assessed, is subject to the payment of the New York Income tax, thereby resulting in double taxation; (6) Because Sub-section Fifth of Section 9, of Chapter 30, General Laws, 1938, under which said tax was levied is unconstitutional and in violation of Article V of the Amendments of the Constitution providing that no state 'shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction equal protection of the law;' (7) Because Subsection Fifth of Section 9, of Chapter 30, of General Laws, 1938, and said tax levied against Petitioners, is unconstitutional under provisions of Section 16, of Article I of the Constitution of Rhode Island, providing that no property shall be taken for public uses without just compensation."

"The petition concludes with the prayer that said tax be declared illegal, unconstitutional and void; that judgment be given for the amount of the tax paid with penalty, interest and costs." . . .

Page 30 of Exhibit B: (See p. 79 of this transcript)

"The question raised by the petition, the plea and the evidence is purely one of law, no material fact being

in dispute. In support of Petitioners' contention, they have submitted for the Court's consideration the cases of *Goodsite v. Lane, et als.*, 139 Fed. 593; *Newcomb v. Page*, 113 N. E. 458 and *In re Dorrance Will*, 3 At. 2nd, 682. These cases have much persuasive force but the issue raised in this case by the pleadings is whether the Statute under which the assessment was made is constitutional. In the case of *Payne & Butler v. Providence Gas Company*, 31 R. I. 295, at page 313, the Supreme Court said:

Page 30-31 of Exhibit B: See p. 80 of this transcript)

"There is only one body that is authorized to interpret the statutes of this State with the view of determining their constitutionality. Under article XII of the amendments to the constitution of the State, adopted in November, 1903, section 1: 'The Supreme Court shall have final revisory and appellate jurisdiction upon all questions of law and equity.' Furthermore, a statute is constitutional or not, as the case may be, without reference to the interpretation of any board or boards of commissioners. It is deemed to be constitutional until this court shall have decided that it is not."

After decision of the Superior Court for the respondents as set forth in the rescript of Sullivan, J., attached hereto marked Exhibit B, the case went to the Supreme Court on the petitioners' bill of exceptions. In the Supreme Court, the Attorney General of Rhode Island moved to intervene because the validity of a state statute was attacked. This motion was granted and the State Tax Commissioner of Rhode Island appeared, filed a brief and argued the validity and constitutionality of the statute in question before the Court.

The opinion of the Supreme Court of Rhode Island squarely held that the statute was valid and constitutional.

Page 32, Exhibit C: (See p. 84 of this transcript)

"This is a petition for relief from the assessment of a tax and is brought under general laws 1938,

Chapter 31, S14. The petitioners are seeking to recover the tax heretofore paid by them under protest, the basis of their petition being that the tax in question was illegally and unconstitutionally assessed against one of them. The matter was heard in the superior court by a justice thereof sitting without a jury. He rendered a decision denying dismissing the petition. A bill of exceptions containing two exceptions, one to the decision and another which is not now pressed, was thereafter prosecuted to this court by the petitioners and is now before us for consideration."

Page 34, Exhibit C: (See p. 87 of this transcript)

"In support of their position, the petitioners contend that, properly construed, subsec. fifth of S9 has no application to the facts and circumstances disclosed by the evidence, and therefore that the tax appearing on the assessment roll of the city of Newport, as hereinbefore set out, is illegally assessed and is void. The petitioners also make the furtner argument, that if the above statute is held to be applicable, then it is unconstitutional under section I of article XIV of the amendments to the constitution of the United States and under sec. 16 of art. I of the constitution of this state.

"On the other hand, the respondents maintain that the only question for this court on the present record is the constitutionality of subsec. fifth of S9 under the above-mentioned provisions of the constitution of the United States and the constitution of this state. They urge that the question of the applicability of the state statute was not before, and was not decided by, the superior court and is not properly before us . . . ."

Page 38-39, Exhibit C: (See p. 93 of this transcript)

"The petitioners also advance the argument that subsec. fifth, #9, should not be applied to the facts of this case because under the law of New York trustees have title to the trust property as joint tenants and

must act as a unit in administering the trust. Although this fact is referred to in support of the decision in some cases, particularly in Massachusetts, we do not understand why it should, in and of itself, prevent the imposition by this state of a tax under subsec. fifth, S9, other requirements of that statute being complied with. The fact that such is the law in New York, where this trust was created, should not in our opinion be held to alone prevent the imposition of a tax by this state, if assessed on persons or property within its jurisdiction, unless such tax is held to be unconstitutional.

"Finally, the petitioners contend that if subsec. fifth, S9, is found to be applicable to the facts herein, such clause is unconstitutional as being contrary to the 'due process' clause of the constitution of the United States and to sec. 16 of Art. I of the constitution of this state, which prevents the taking of private property for public uses without just compensation

. . . . . .

Page 41, Exhibit C: (See p. 95 of this transcript)

"In the instant case the record shows that prior to the hearing in the superior court a motion was made to certify the constitutional question raised herein to the supreme court. Under our interpretation of the statute as above set forth, the denial of that motion merely delayed the time of certification until the case came here on petitioners' exceptions after final hearing and decision. The certification of the constitutional question therefore is automatically before us for consideration and decision.

Pages 41-43, Exhibit C: (See ps. 96, 97, 98, 99 of this transcript)

"The petitioners admittedly do not claim unconstitutionality on the ground of double taxation. It has recently been held that such taxation is permissible. See *Curry* v. *McCanless*, 307 U. S. 357; *State Tax*

Comm. of Utah v. *Aldrich*, 316 U. S. 174. The petitioners do urge as a valid ground for their claim that the state renders no equivalent for the tax against George Henry Warren, Jr. as trustee, and renders no protection and extends no benefit to the trust fund. This general test of constitutionality is based by them on the following language used in the majority opinion in *State Tax Comm. of Utah* v. *Aldrich*, *supra*, at page 181: 'In line with our recent decisions * * * we repeat that there is no constitutional rule of immunity from taxation on intangibles by more than one State. In case of shares of stock, 'jurisdiction to tax' is not restricted to the domiciliary State. Another State which has extended benefits or protection, or which can demonstrate 'the practical fact of its power' or sovereignty as respects the shares * * * may likewise constitutionally make its exaction.'

"The petitioners maintain that in the instant case the above requirement is not met. We are of the opinion that it is. While it is true that nothing appears on the record to show that this state has as yet actually extended any specific benefit to or protection over the resident trustee or the trust fund, other than by the decree of the probate court of Newport hereinbefore mentioned, nothing indicates that the state is not ready, willing and capable of doing so if requested. We know of nothing in our statutes or decisions which is of a discriminatory nature respecting a resident trustee of a trust originating in another state. Such trustee in our opinion, would be entitled to the same benefits and protection from the laws of this state as would any other natural person here resident.

"But, however, that may be, we are satisfied that the state can demonstrate the practical fact of its power or sovereignty over the resident trustee and through him over the trust fund which he holds. In the *Curry* case, *supra*, at page 366, the court states that rights to intangibles 'are but relationships between persons, natural or corporate, which the law recognizes by attaching to them certain sanctions enforceable in courts. The power of government over them and the protection

which it gives them cannot be exerted through control of a physical thing. They can be made effective only through control over and protection afforded to those persons whose relationships are the origin of the rights. * * *. Obviously, as sources of actual or potential wealth—which is an appropriate measure of any tax imposed on ownership or its exercise—they cannot be dissociated from the persons from whose relationships they are derived.' And at page 372 the court used the following language: 'In effecting her purposes, the testatrix brought some of the legal interests which she created within the control of one state by selecting a trustee there and others within the control of the other state by making her domicile there.'

"Since a question involving the taxation of trustees and trust funds was raised in the Curry case, it is clear that the above general principles respecting intangibles were intended to apply as well to trusts and trustees as to ordinary ownership of that class of property. Further, those principles are stated in such broad and comprehensive terms in the cited cases that in our opinion it was intended that they should apply even though the actual evidences of the intangible property might not be in the taxing state. Thus in the instant case, in our opinion, the residence in this state of the trustee George Henry Warren, Jr. gives it such power and sovereignty over him as trustee that, in proper proceedings, he would become amenable to the laws of this state and to the orders of its courts, and likewise he would be afforded such benefit and protection, as trustee, as could properly be accorded him. In our judgment the above test, when applied to the constitutionality of our taxing statute, is therefore satisfied by the facts shown.

"A rule is enunciated in *Goodsite* v. *Lane*, 139 Fed. 593 (1905) cited by the petitioners, to the effect that for a tax on intangibles assessed against a resident trustee to be valid and constitutional he must be exercising his office of trustee within the state and enjoying as trustee privileges of value to the estate for which it is just the estate should pay. This rule, in

our opinion, would be difficult of application if it appeared that the resident trustee exercised his office within the state only occasionally, or at different periods during a given year, and frequently that he did not so exercise his office at all. In any event, however, such rule, as we see it, is superseded and is no longer operative, because of the views expressed and the general principles set out by the supreme court of the United States regarding the taxation of intangibles in the recent cases of *Curry* v. *McCanless* and *State Tax Comm. of Utah* v. *Aldrich, supra*, and others.

"We therefore find that subsec. fifth, Sec. 9 is not contrary to the provisions of section 1 of art. XIV of the amendments to the constitution of the United States or to sec. 16 of Art. I of the constitution of this state, but is valid and constitutional, and that the tax involved herein, under all the facts and circumstances, was properly assessed by the respondents against George Henry Warren, Jr. as trustee. The trial justice did not err in denying and dismissing the petition.

"The petitioners' exceptions are overruled, and the case is remitted to the superior court."

The case was remitted to the Superior Court for the County of Newport and on July 2, 1946 the Superior Court entered an order denying a petition and giving judgment to the defendants which became a final judgment in said cause.

It will be noted the question of the validity of this statute was constantly before the Court during all the proceedings and squarely raised and decided.

The petitioners claim that a substantial question is involved in this case, namely the right of a state or subdivision thereof, to levy a tax on a trust fund held jointly by two trustees merely because one trustee happens as an individual to be a resident of the taxing state (1) when the intangible trust property is not in the taxing state or subdivision thereof and never has been; (2) when the trust is created

by a will of a non-resident and administered in and under the laws of another state; (3) when the beneficiary is a non-resident and (4) when the co-trustee is also a non-resident.

Anthony v. *Caswell*, 15 R. I. 159 (1885);
State Tax on Foreign Held Bonds, 15 Wall. 300;
Union Transit Co. v. *Kentucky*, 199 U. S. 194;
Frick v. *Pennsylvania*, 268 U. S. 473-488;
R. I. Hospital Trust Co. v. *Doughton*, 270 U. S. 69;
Safe Deposit & Trust Co. v. *Virginia*, 280 U. S. 83, (50 S. Ct. Reporter 59);
Utah v. *Aldrich*, (1942) 316 U. S. 174, 62 S. Ct. 1008.

The State of Rhode Island has not extended benefits or protection to this trust fund and therefore a substantial question is involved as to its right to tax the petitioner George H. Warren, Jr., as trustee.

Respectfully submitted,

(S.) William R. Harvey.
(S.) William Greenough.

EXHIBIT A

AND, on the 21st day of February, A. D. 1945, there was filed in the office of the Superior Court in said County of Newport, in said State of Rhode Island, the following:

Rescript

Sullivan, J. Heard on Respondent's motion to strike out the name of William B. Greenough as one of the petitioners, because of misjoinder of parties; that said Greenough is not aggrieved by any tax assessed against him, as trustee, because the assessment is against George Henry Warren, Jr., trustee, and that said Greenough is not assessed; and that said William B. Greenough, trustee, is not a "person aggrieved on any ground whatsoever by any assessment of taxes against him," Ch. 31, Sec. 14, General Laws 1938, and that he is improperly joined as a petitioner.

The facts in this motion are not in dispute. The Chairman of the Board of Tax Assessors testified as to the imposition of a tax against George Henry Warren, Jr., a resident of Newport, R. I., under the will of George Henry Warren, Sr., who died a resident of New York, on intangibles for the benefit of Constance Whitney Warren, on one-half of the property held in trust. The assessment was made by virtue of Subsection 5 of Section 9, Chapter 30, General Laws, 1938. The trust estate of $25,000 was held jointly by said Warren and by said Greenough, a resident of the State of New York. The tax of $50 was paid under protest by the trustees, which they seek to recover back by virtue of Section 14 of Chapter 31, General Laws 1938, on the ground that the assessment was illegal, void and unconstitutional.

Section 14 of Chapter 31, General Laws 1938, which gives to "any person aggrieved on any ground whatsoever by any assessment of taxes against him" etc. is a remedial statute and must be liberally construed. See cases under Workmens' Compensation Act, Vols. 54, 61 and 65 R. I. There can be no question but that the tax is assessed against the fund. This was so held in Clarke vs. Addelman, 26 R. I. 168. Section 4 of Chapter 486, General Laws, vests in co-

trustees "title to all of the trust estate." See Edwards vs. Cardarelli, 65 R. I. 236, where the Court said: "A guardian, unlike a trustee * * * does not take legal title to his ward's personal property." Here, Warren and Greenough were appointed co-trustees to administer the estate in question; and in the case of Angel vs. Moni, 45 R. I. 186, it was held that "any action depending on the exercise of judgment or discretion on the part of the trustees requires the joint action of all." See Kramme v. Newshaw, 147 Md. 535, 128 Atl. 468. Also, Donovan vs. Miller, 112 At. 926 (Md.)

Now under the well-established principles of law concerning the assessment of taxes being against the fund, the joint ownership of the legal title of the fund by the trustees, the indivisibility of the res constituting the estate and the duty of the trustees to act collectively, the only question remaining is whether said Greenough is a party "aggrieved on any ground whatsoever."

The court in Tillinghast vs. Brown, 24 R. I. 179, a probate appeal, states the rule to be that,

> "A party is aggrieved by the judgment or division when it operates on his rights of property or bears directly on his interest."

The word "aggrieved" refers to a substantial grievance, the denial of some personal property right or the imposition upon a party of a burden or obligation.

A party aggrieved is one whose pecuniary interest is directly affected by the decree; one whose right of property may be established or divested by the decree; and, quoting from Lawless vs. Regan, 128 Mass. 592:

> "In order to have a right of appeal from the judgment of the Court, it must appear that the party appealing has some pecuniary interest or some personal right which is immediately or remotely affected or concluded by the decree appealed from."

See *Roullard* vs. *McSoley*, 54 R. I. 232, at 234 R. I. *Hospital Trust Co.* vs. *Hopkins*, 38 R. I. 59, at 69.

Hamilton Mfg. Co. vs. *City of Lowell*, 274 Mass. 477, 175 N. E. 73.

The Hamilton Manufacturing Co. case is a tax case where the Court held that a person aggrieved "means one whose pecuniary interests are or may be adversely affected."

The respondent contends that to allow said Greenough to continue as a petitioner will tend to becloud the issue, embarrass the respondent and confuse the Court. The Court cannot follow this reasoning against the rights which said Greenough has as a co-trustee of the fund, a part of which is being assessed. Under the provisions of the remedial Statute, Section 14 of Chapter 31 of the General Laws, 1938, it would seem to the Court that he falls within the rule of a person "aggrieved." At the most, if his name is allowed to remain as a petitioner, and if he is not entitled to become a party, it is mere surplusage; and if his name is stricken out and he is not entitled to petition the Court for redress under the statute, it is a most serious matter, as he has been denied his constitutional right.

For the above reasons, the motion to strike out is denied.

EXHIBIT B

AND, on the 25th day of April, A. D. 1945, there was filed in the office of the Superior Court in said County of Newport, in said state of Rhode Island, the following:

Decision

SULLIVAN, *J.*:

Heard on prayer of Petitioners for relief from tax assessment under the provisions of Sec. 14, of Chapter 31, of the General Laws, 1938. The facts set out in the petition are not in dispute and show briefly that George Henry Warren, a resident and citizen of New York, died June 3, 1943, leaving a will, which was duly admitted to probate in New York, and letters testamentary were issued to the Petitioners

June 30, 1943, they being the executors named therein; that a copy of said will was filed in the Probate Court of Newport and letters testamentary in Rhode Island were issued to said Petitioners. Then comes the recital of the fifth and sixth clauses of the will giving to the executors and trustees named in said will Four hundred thousand dollars in trust for the benefit of testator's daughter, Constance Whitney Warren, for life. Paragraph sixth provides for a further addenda of Two hundred thousand dollars to be added to the original trust on the same terms and conditions; that said Greenough and Constance Whitney Warren are both residents of New York, while George Henry Warren, Jr., the other trustee, is a resident of Newport; that the whole of the trust estate is now and has at all times been located in the City, County and State of New York; that the Respondents assessed George Henry Warren, Jr., upon intangible personal property held in trust by said Petitioners as trustees, on June 15, 1944, for the benefit of Constance Whitney Warren, described in paragraph 2 of said petition as follows:

> Warren George H., Jr., Trustee, U. W. of George H. Warren, Intangible Personal Property $12,500, Tax $50.

This tax was paid under protest and the Petitioners contend that said assessment is illegal, unconstitutional and void; (1) Because the property assessed was owned by a non-resident testator and was located in the State of New York and never located in Rhode Island; (2) Because the beneficiary for life and one of the trustees are residents of New York; (3) Because said trust fund is held by said trustees as joint tenants, their interest in said fund being not severable or divisible and their powers must be exercised as a unit; (4) Because Petitioner Warren, as a resident of Rhode Island, does not as trustee exercise his powers as trustee in Rhode Island and enjoys no protection or profit from this State; (5) Because said trust fund, on which said tax was assessed, is subject to the payment of the New York Income Tax, thereby resulting in double taxation; (6) Because Sub-section Fifth of Section 9, of Chapter 30, General Laws, 1938, under which said tax was levied is unconstitu-

tional and in violation of Article V of the Amendments of the Constitution providing that no State "shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction equal protection of the law;" (7) Because Sub-section Fifth of Section 9, of Chapter 30, of General Laws, 1938, and said tax levied against Petitioners is unconstitutional under provisions of Section 16, of Article 1 of the Constitution of Rhode Island, providing that no property shall be taken for public uses without just compensation.

The petition concludes with the prayer that said tax be declared illegal, unconstitutional and void; that judgment be given for the amount of the tax paid with penalty, interest and costs.

The Petitioners substantiated their allegations of fact by calling the Chairman of the Board of the Tax Assessors, the Clerk of the Probate Court of Newport and one of the Petitioners, William Greenough, an attorney of the New York Bar, who qualified as an expert and testified to the law of the State of New York on taxation applicable to the facts in this case. The Chairman of the Board of the Tax Assessors was recalled by the Respondent and gave testimony as to further information he had received regarding the trust estate and value of the same.

The question raised by the petition, the plea and the evidence is purely one of law, no material fact being in dispute. In support of Petitioners' Contention, they have submitted for the Court's consideration the cases of *Goodsite* vs. *Lane*, et als., 139 Fed. 592; *Newcomb* vs. *Page*, 113 N. E. 458 and *In re Dorrance Will*, 3 At. 2nd. 682. These cases have much persuasive force but the issue raised in this case by the pleadings is whether the Statute under which the assessment was made is constitutional. In the case of *Payne & Butler* vs. *Providence Gas Company*, 31 R. I., 295 at page 313, the Supreme Court said:

> "There is only one body that is authorized to interpret the statutes of this State with the view of determining their constitutionality. Under article XII of the amendments to the constitution of the State, adopted in November, 1903, section 1: 'The supreme court shall

have final revisory and appellate jurisdiction upon all questions of law and equity.' Furthermore, a statute is constitutional or not, as the case may be, without reference to the interpretation of any board or boards of commissioners. It is deemed to be constitutional until this court shall have decided that it is not."

In the case of *Fritz vs. Presbrey* et al., 44 R. I. 207, our Court quoted from the East Shore Land Co. *vs.* Peckham, 33 R. I. 541, as follows:

" 'All statutes are presumed to be valid and constitutional and the burden of proving the unconstitutionality of any statute is upon the party raising the question; furthermore, the rule is that he must prove it beyond a reasonable doubt.' "

The Court, a little further on in the same case, quotes from Wellington et al., Petitioners, 16 Pick. 87 from the opinion of Chief Justice Shaw as follows:

" 'When called upon to pronounce the invalidity of an act of legislation passed with all the forms and solemnities requisite to give the force of law, courts will approach the question with great caution, examine it in every possible aspect and ponder upon it as long as deliberation and patient attention can throw any new light on the subject, and never declare a statute void unless the nullity and invalidity of the act are placed in their judgment beyond a reasonable doubt.' "

The assessment in question was made in strict compliance with Sub-section Fifth, of Section 9, of Chapter 30, of the General Laws, 1938, and there is nothing in the proof offered to justify the Court in saying that the tax assessors deviated in one iota in this assessment from the law as laid down in the above-mentioned statute. The petition is therefore denied.

EXHIBIT C

AND, on the 31st day of May A. D. 1946, there was filed in the office of the Supreme Court in County of Providence and said State of Rhode Island the following:

OPINION

BAKER, *J.*

This is a petition for relief from the assessment of a tax and is brought under general laws 1938, chapter 31, #14. The petitioners are seeking to recover the tax heretofore paid by them under protest, the basis of their petition being that the tax in question was illegally and unconstitutionally assessed against one of them. The matter was heard in the superior court by a justice thereof sitting without a jury. He rendered a decision denying and dismissing the petition. A bill of exceptions containing two exceptions, one to the decision and another which is not now pressed, was thereafter prosecuted to this court by the petitioners and is now before us for consideration.

The evidence shows the following pertinent facts, among others. The petitioners, William Greenough and George Henry Warren, Jr., are the duly qualified executors and cotrustees under the will of George Henry Warren, who died June 3, 1943 and who was a resident of the city of New York. That will was duly admitted to probate by a decree of the surrogate's court of the county of New York entered June 30, 1943, and letters testamentary were issued to the petitioners. A copy of the will, authenticated under the act of Congress, was also ordered filed and recorded, and letters testamentary in Rhode Island were issued to the petitioners by a decree of the probate court of the city of Newport in this state entered November 15, 1943.

Under the fifth clause of the will the petitioners were bequeathed the sum of $400,000 to be held by them in trust to pay the net income therefrom, in the first instance, to the testator's daughter Constance Whitney Warren for and during her natural life. The clause then contained

other and further provisions respecting said sum and the income therefrom in the event of the taking place of certain contingencies not now material to the issues before us. By the sixth clause of the will the testator also bequeathed to the petitioners the further sum of $200,000 "in augmentation of and to be added to the principal of the trust created by the fifth clause of this my will for the benefit of my daughter Constance Whitney Warren to be held and disposed of by them upon the same terms and conditions as set forth in said fifth clause".

Further, it appears from the evidence that the testator's daughter, Constance Whitney Warren is a resident of the state of New York; that the petitioner and trustee William Greenough is likewise a resident of that state; but that the petitioner and trustee George Henry Warren, Jr. is a domiciled resident of the city of Newport in this state. It is not disputed that at the time of the death of the testator and on June 15, 1944 at 12 o'clock noon, which was the time of the assessment of the tax involved in this proceeding, and at all times up to the hearing in the superior court, all of the intangible personal property constituting the principal of the above-mentioned trust fund was located in the city of New York and never has been located in this state.

It is admitted that the tax in question was assessed by the respondents under the provisions of G. L. 1938, chap. 30, §9, subsec. fifth, which is as follows: "Intangible personal property held in trust by an executor, administrator, or trustee, whether under an express or implied trust, the income of which is to be paid to any other person, shall be taxed to such executor, administrator, or trustee in the town where such other person resides; but if such other person resides out of the state, then in the town where the executor, administrator, or trustee resides; and if there be more than one such executor, administrator, or trustee, then in equal proportions to each of such executors, administrators, and trustees in the towns where they respectively reside."

According to the evidence a tax of $50 for the fiscal year 1944 to 1945 appears on the assessment roll of the city of Newport as follows: "George H. Warren junior, trustee

under will of George H. Warren for Constance W. Warren, assessment of $12,500, intangible personal property". The uncontradicted evidence shows that, according to information given the tax assessors of Newport, prior to the above assessment, by an attorney at law representing the trustee George Henry Warren, Jr., $12,500 was one half of the sum held by the trustees on the date of the assessment as the then *corpus* of the aforesaid trust created under the fifth and sixth clauses of the testator's will.

The respondents argue that the petition was correctly denied and dismissed by the superior court because it could not properly be brought in its present form under #14, and also because the petitioners were not entitled to recover the tax which they had paid, in view of the facts appearing in evidence respecting the nature of such payment. These defenses were not set out by the respondents in any of their pleadings, were not brought to the attention of that court and apparently are raised for the first time in argument before us. Because of our ultimate disposition of the present petition, it is not necessary for us to pass upon the above questions and we shall, for the purposes of this case only, assume that the petition is properly brought and that the petitioners are not prevented from recovering the tax in question merely by reason of the evidence relating to the manner of its payment.

In support of their position, the petitioners contend that, properly construed subsec. fifth of #9 has no application to the facts and circumstances disclosed by the evidence, and therefore that the tax appearing on the assessment roll of the city of Newport, as hereinbefore set out, is illegally assessed and is void. The petitioners also make the further argument that if the above statute is held to be applicable, then it is unconstitutional under Section 1 of article XIV of the amendments to the Constitution of the United States and under sec. 16 of art. I of the constitution of this state.

On the other hand, the respondents maintain that the only question for this court on the present record is the constitutionality of subsec. fifth of #9 under the above-mentioned provisions of the Constitution of the United

States and the constitution of this state. They urge that the question of the applicability of the state statute was not before, and was not decided by, the superior court and is not properly before us.

While the record of the hearing before the superior court is not as clear and definite on that issue as is desirable, nevertheless we have come to the conclusion that such question was before that court and was decided by it adversely to the petitioners. After testimony had been taken setting out the material facts, the trial justice filed a rescript which ended in the following language: "The assessment in question was made in strict compliance with Sub-section Fifth, Section 9, of Chapter 30, of the General Laws, 1938, and there is nothing in the proof offered to justify the Court in saying, that the tax assessors deviated in one iota in this assessment from the law as laid down in the above-mentioned statute."

If this language cannot properly be construed as a finding that the statute was applicable, then in our opinion the trial justice was making no finding whatever since he showed in his rescript that he was aware that he had no authority to pass on the constitutionality of such statute, and no facts were in dispute. In our judgment we should not assume that he was filing a meaningless rescript. The only issue therefore on the present record which the superior court had jurisdiction to decide involved the applicability of the statute in question.

Whether or not subsec. fifth of 9 is applicable to the facts of the instant case merits careful consideration. We find nothing in the express provisions of the clause which in our opinion prevents its applicability. There is, at least, a direct authorization to the taxing body to impose a tax on the intangible personal property held by any resident trustee, and a direction as to the place and manner of levying such a tax. The language used is simple and without ambiguity. The subsection is broad in its scope and there are no express exceptions or words of limitation employed. Resident trustees of trust originating in another jurisdiction are not specifically or by implication excluded from the operation of the subsection. In fact, the general assembly, in our

opinion, has in the statute shown its intent that intangible personal property, wherever located, when in the possession of such resident trustees, is taxable in this state according to the terms thereof. Unquestionably in such matters the policy of the law is controlled and fixed by the legislative not the judicial branch of the state government.

The petitioners do not question the fact that the letter of the statute was followed by the respondents in assessing the tax involved here. The statute in substantially its present form has been construed by this court in several cases. See *Anthony v. Caswell,* 15 R. I. 159; *Ailman & Honey, Petitioners,* 17 R. I. 362. In the first of these the court held that the provisions of a statute in the language of the statute now before us did not permit a *nonresident* trustee, who had no property in this state, to be taxed in the town in this state where his *cestui que* trust resided.

In the second of the cases, however, the court upheld the tax assessed in Newport against the trustee there resident, who held in trust mortgages on real estate in Newport, but who was appointed by a South Carolina court under the will of a deceased resident of that state. The *cestui que* trust who was entitled to the income of the trust estate resided in New York. Perhaps the tax in that case and the applicability of the statute to those facts can be more readily supported than can the tax in the instant case because the trustee in that case had invested part of the trust estate in mortgages in Newport property, to which fact the court specifically referred in its opinion, whereas all the trust estate in the present case is located in New York. However, a careful consideration of the opinion leads us to the belief that in principle it fully supports the position that the taxing statute is applicable to the facts of the case now before us.

For example, in the *Ailman & Honey* case the court used the following language at pages 364, 365: "There is no question of the right of the State to put all property within its jurisdiction under contribution for necessary revenue. * * * In the case before us, the legal owner resides here, and he has invested a part of his trust estate here; so that the situs of the property is doubly fixed. The fact that the

authority of the trustee comes from another State does not change the fact of his residence and legal title within this State; nor the fact that the property taxed is here, by reason of its investment in loans secured by mortgages within this State, which run to the trustee." (italics ours)

The court thus clearly holds that the fact that the trustee, the legal owner of the trust property, resides in this state fixed here for our tax purpose the *situs* of the trust property held by him in so far as intangible personal property is concerned. It is well settled that ordinarily a trustee is considered for taxation purposes to be the owner of the property which he holds in trust. The court so held in *Anthony v. Caswell, supra*, saying, at page 161: "The statute, following the common rule, clearly recognizes executors, administrators, and trustees as the owners, for the purposes of taxation, of the property held in trust by them." The *situs* of intangible personal property for the imposition of a tax is at the domicile of such owner. *Edwards v. Cardarelli*, 65 R. I. 236.

We find, therefore, that, aside from any question of constitutionality the provisions of subsec. fifth of #9 are applicable to the facts of the instant case, and that the tax assessed against George Henry Warren, Jr. as trustee is to that extent valid and is not beyond the scope and authority of the statute.

Since this issue of applicability is largely governed, at least as far as we are concerned, by the principles laid down in our own cases as above indicated, it ordinarily would not be necessary to discuss authorities from other jurisdictions. The petitioners, however, have cited several cases upon which they strongly rely and we will refer to certain of them briefly. In these cases, on facts somewhat similar to those in the present case, it was held that the tax under consideration was improperly assessed. In our opinion they are distinguishable from the case now before us.

In *Newcomb v. Paige*, 224 Mass. 516, the court applied the principle of interstate comity and also found, at page 519, that a particular sentence in the Massachusetts taxing act "is some indication of a legislative purpose that a trust fund lawfully within the taxing jurisdiction of another

State and there making a just contribution to the support of government, should not be made liable to another tax here." In the present case we perceive no indication of any such legislative purpose in our own act but, as we have stated, find from its language a directly contrary intent. In the *Ailman & Honey* case this court said, at page 364, referring to the trust fund before it: "If it be thus liable to double taxation, here and elsewhere, that has to do with the policy of the law, over which we have no control."

In *Dorrance's Estate*, 333 Pa. 162, the court in arriving at its decision, construed the language of the taxing statutes, in respect to the ownership, holding or possession of trust property, narrowly and also pointed out that the statute contained no provision for dividing such trust property among resident and nonresident trustees for the purpose of assessing the tax. Our statute, on the other hand, has a specific provision allowing proportionate taxation as to resident trustees.

Harrison v. Com'r. of Corps. & Taxation, 272 Mass. 442, involved the imposition of the Massachusetts income tax on trust estates originating and administered outside of that state, certain of the trustees, however, being residents therein. In refusing to allow the tax the court, at page 428, stated: "The principle, that the situs of intangible property held in trust, in the absence of other controlling factors follows the person of the trustee, becomes inapplicable because by a dominating law its situs is fixed in the place where the testamentary trust was created and established and is being administered under direction of its court. For all purposes incident to the cases at bar, its situs is immovably established within the State where the testamentary trust of which it is a part is being administered." Such a holding in our opinion appears to be contrary in principle to the views already expressed by this court and so understood cannot be followed by us. We find no controlling factor which takes the instant case out of the general rule respecting the *situs* of intangible personal property held in trust.

The petitioners also advance the argument that subsec. fifth, #9, should not be applied to the facts of this case because under the law of New York trustees have title to

the trust property as joint tenants and must act as a unit in administering the trust. Although this fact is referred to in support of the decision in some cases, particularly in Massachusetts, we do not understand why it should, in and of itself, prevent the imposition by this state of a tax under subsec. fifth, #9, other requirements of that statute being complied with. The fact that such is the law in New York, where this trust was created, should not in our opinion be held to alone prevent the imposition of a tax by this state, if assessed on persons or property within its jurisdiction, unless such tax is held to be unconstitutional.

Finally, the petitioners contend that if subsec. fifth, #9, is found to be applicable to the facts herein, such clause is unconstitutional as being contrary to the "due process" clause of the constitution of the United States and to sec. 16 of art. I of the constitution of this state, which prevents the taking of private property for public uses without just compensation.

Before we deal with this contention it should be determined whether or not it is properly before us. At the outset it should be noted that in this civil proceeding only the unconstitutionality of an act of the general assembly is brought in question upon the record and that no constitutional question of any other nature or kind is raised. That being so the provisions of G. L. 1938, chap. 545, as amended, apply. Section 1 of that chapter was repealed by P. L. 1940, chap. 941, sec. 1, and #6 of chap. 545 was amended by sec. 2 of chap. 941 to read as follows: "Whenever in any proceedings, civil or criminal, in the superior court or in any district court, prior to the trial thereof on its merits, or upon a motion in arrest of judgment, any question of law shall arise, or the constitutionality of an act of the general assembly shall be brought in question upon the record, which in the opinion of the court, or in the opinion of the attorney-general, if the state be a party to such proceeding, is of such doubt and importance, and so affects the merits of the controversy that it ought to be determined by the supreme court before further proceedings, the court in which the cause is pending shall certify such question or motion to the supreme court for that pur-

pose and stay all further proceedings until the question is heard and determined . . . ."

Under #1 of chap. 545, now repealed, the procedure involving certification of such questions before trial was relatively simple. Upon consideration we are of the opinion that in repealing 1 of chap. 545 and by amending #6 of that chapter as above set out it was not the intention of the general assembly to prevent entirely, in a civil case, the certification of constitutional questions of the kind now before us in instances where a justice of the superior court has refused to exercise his discretion in favor of immediate certification. In our opinion the object of sec. 2, chap. 941, P. L. 1940, was merely to give a justice of the superior court in the ordinary civil proceeding discretion in the matter of certifying to the supreme court such constitutional questions prior to the trial of the case, where previously such certification was mandatory. As we view it, the issue, on a motion to certify under #6 as amended, is merely the time of certification and the refusal to certify immediately is not a final disposition of the motion. In our judgment such a motion when once made, if denied in the first instance, nevertheless remains alive until after the case is fully heard and determined, when it comes before us automatically and without further action, in the event a bill of exceptions or appeal is prosecuted to this court by either party.

While #6 as amended does not expressly provide for the above procedure, nevertheless in our opinion it may reasonably be implied therein in the interest of uniform practice and in the preservation of the right of certification under the above circumstances. Such a procedure in effect would be substantially analogous to that specifically provided for in #2 of chap. 545 in respect to the certification of this kind of a constitutional question in a criminal case. There it is expressly provided that the decision of such question be reserved, that the trial of the case proceed to a determination as if the statute were constitutional, and that then, if the defendant is found guilty, the constitutional question raised is to be certified forthwith to the supreme court.

In the instant case the record shows that prior to the hearing in the superior court a motion was made to certify the constitutional question raised herein to the supreme court. Under our interpretation of the statute, as above set forth, the denial of that motion merely delayed the time of certification until the case came here on petitioners' exceptions after final hearing and decision. The certification of the constitutional question therefore is automatically before us for consideration and decision.

The petitioners admittedly do not claim unconstitutionality on the ground of double taxation. It has recently been held that such taxation is permissible. See *Curry v. McCanless*, 307 U. S. 357; *State Tax Comm. of Utah v. Aldrich*, 316 U. S. 174. The petitioners do urge as a valid ground for their claim that the state renders no equivalent for the tax against George Henry Warren, Jr. as trustee, and renders no protection and extends no benefit to the trust fund. This general test of constitutionality is based by them on the following language used in the majority opinion in *State Tax Comm. of Utah v. Aldrich*, *supra*, at page 181: "In line with our recent decisions • • • we repeat that there is no constitutional rule of immunity from taxation of intangibles by more than one State. In case of shares of stock, 'jurisdiction to tax' is not restricted to the domiciliary State. Another State which has extended benefits or protection, or which can demonstrate 'the practical fact of its power' or sovereignty as respects the shares • • • may likewise constitutionally make its exaction."

The petitioners maintain that in the instant case the above requirement is not met. We are of the opinion that it is. While it is true that nothing appears on the record to show that this state has as yet actually extended any specific benefit to or protection over the resident trustee or the trust fund, other than by the decree of the probate court of Newport hereinbefore mentioned, nothing indicates that the state is not ready, willing and capable of doing so if requested. We know of nothing in our statutes or decisions which is of a discriminatory nature respecting a resident trustee of a trust originating in another state.

Such trustee, in our opinion, would be entitled to the same benefits and protection from the laws of this state as would any other natural person here resident.

But, however that may be, we are satisfied that the state can demonstrate the practical fact of its power or sovereignty over the resident trustee and through him over the trust fund which he holds. In the *Curry* case, *supra*, at page 366, the court states that rights to intangibles "are but relationships between persons, natural or corporate, which the law recognizes by attaching to them certain sanctions enforceable in courts. The power of government over them and the protection which it gives them cannot be exerted through control of a physical thing. They can be made effective only through control over and protection afforded to those persons whose relationships are the origin of the rights. * * * Obviously, as sources of actual or potential wealth —which is an appropriate measure of any tax imposed on ownership or its exercise—they cannot be dissociated from the persons from whose relationships they are derived." And at page 372 the court used the following language: "In effecting her purposes, the testatrix brought some of the legal interests which she created within the control of one state by selecting a trustee there and others within the control of the other state by making her domicile there."

Since a question involving the taxation of trustees and trust funds was raised in the *Curry* case, it is clear that the above general principles respecting intangibles were intended to apply as well to trusts and trustees as to ordinary ownership of that class of property. Further, those principles are stated in such broad and comprehensive terms in the cited cases that in our opinion it was intended that they should apply even though the actual evidences of the intangible property might not be in the taxing state. Thus in the instant case, in our opinion, the residence in this state of the trustee George Henry Warren, Jr. gives it such power and sovereignty over him as trustee that, in proper proceedings, he would become amenable to the laws of this state and to the orders of its courts, and likewise he would be afforded such benefit and protection, as trustee, as could properly be accorded him. In our judg-

ment the above test, when applied to the *constitutionality* of our taxing statute, is therefore satisfied by the facts shown.

A rule is enunciated in *Goodsite v. Lane*, 139 Fed. 593 (1905), cited by the petitioners, to the effect that for a tax on intangibles assessed against a resident trustee to be valid and constitutional he must be exercising his office of trustee within the state and enjoying as trustee privileges of value to the estate for which it is just the estate should pay. This rule, in our opinion, would be difficult of application if it appeared that the resident trustee exercised his office within the state only occasionally, or at different periods during a given year, and frequently that he did not so exercise his office at all. In any event, however, such rule, as we see it, is superseded and is no longer operative, because of the views expressed and the general principles set out by the supreme court of the United States regarding the taxation of intangibles in the recent cases of *Curry v. McCanless* and *State Tax Comm. of Utah v. Aldrich*, *supra*, and others.

We therefore find that subsec. fifth, #9, is not contrary to the provisions of section 1 of art. XIV of the amendments to the constitution of the United States or to sec. 16 of art. I of the constitution of this state, but is valid and constitutional, and that the tax involved herein, under all the facts and circumstances, was properly assessed by the respondents against George Henry Warren, Jr. as trustee. The trial justice did not err in denying and dismissing the petition.

The petitioners' exceptions are overruled, and the case is remitted to the superior court.